



Commonwealth of Massachusetts State Ethics Commission

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RE: PUBLIC ENFORCEMENT LETTER 90-1

Dear Superintendent Wilson:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you violated G.L. c. 268A, § 3 by permitting a vendor to pay directly, travel expenses you incurred in 1988 on official business trips to the vendor's corporate headquarters. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not feel that further, proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, you do not necessarily admit to the facts and law as discussed below. (As noted below, you have maintained that your conduct did not violate the conflict law). The Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. You have been Superintendent of the Boston Public Schools (BPS) since the fall of 1985. In June 1987, the Boston School Committee adopted your recommendation to use a single basal reader for the BPS.

2. Between July and August 1987, a group of 40 teachers and parents evaluated the basal reading programs of nationally recognized publishers. The group's first choice for a publisher was Harcourt, Brace, Jovanovich (HBJ).

3. On December 16, 1987, HBJ made a presentation to the BPS staff in Boston. MacMillan's presentation occurred two days later.

4. On January 22, 1988, after you met with other staff, teachers and principals to discuss the reading proposal, you made a written recommendation that the School Committee adopt the HBJ proposal.

5. On February 9, 1988, the School Committee voted to adopt the HBJ reading program.

6. While it took several months for BPS and HBJ to agree to all of the details of a contract,¹ the basic outlines of the agreement were understood in early February. By letter dated February 12, 1988, the BPS General Counsel began the process of reducing that understanding to writing. In her letter, she confirmed that HBJ had agreed to provide "the following services at no extra cost beyond the stated cost of the textbooks and associated materials." Included in the enumerated list of services is "Development of Customized Materials" which basically involved the development of the remedial reading program. Not included, however, was any specific reference to HBJ paying for the costs of BPS staff travel.

7. The remedial reading program alluded to in the foregoing was not the basal reading program adopted in June of 1987. It was instead an additional, tailor-made program designed for Boston's middle schools, but adaptable for other urban school systems. By agreeing to develop these materials at no cost to BPS, HBJ essentially donated their services and facilities to BPS for this limited purpose.

8. On February 23, 1988 you and members of your staff met with the HBJ senior vice president and several HBJ editors in Boston to review a draft of the new middle school remedial reading materials. BPS staff strongly rejected the materials because they were not appropriate for an urban, minority student population such as Boston's. The HBJ senior vice president and staff returned to Orlando and reviewed Boston's evaluation of those materials. After extensive review, the HBJ officials decided to hold the next review session at the work location of their writers and editors. HBJ's senior vice president believed that it was much more cost-effective to bring four BPS people to the HBJ headquarters rather than to fly 10 to 12 members of his staff to Boston, where they would incur additional meal and lodging expenses.

9. Accordingly, on March 7, 1988, you and three staff members went to Orlando, Florida, at HBJ's expense, to meet with the HBJ staff. You met with about 10 HBJ staff members who had responsibility for book layout, photography decisions, copy and other production details. You met also with approximately nine other members of the HBJ staff for a program entitled "Discussion of a New Developmental Reading Program for Less-Prepared Students in Grades Six, Seven, and Eight." The program was sponsored and paid for by HBJ. The meetings lasted from 4:30 to 9:30 P.M. Monday, and from 8:00 to 10:30 A.M. breakfast on Tuesday, and included a group dinner on Monday and breakfast on Tuesday. The agenda was fairly detailed. It included no extra-curricular activities. All guests traveled to Orlando in coach class, and stayed at the Stouffer's Orlando Resort (approximately \$93 each for the lodging).

Dinner for 13 at Dux's Restaurant cost \$884 (\$68 each), and breakfast for 14 at Stouffer's cost \$151 (\$10 each).

10. You and your staff returned on March 8, 1988.² On August 16, 1988, you again went to Orlando, at HBJ's expense, to film two in-service training videos to be used with BPS staff at the opening of school.³ You flew first class, and you were treated to lunch (\$35 for two) and dinner (\$32.78 for two) while there. You returned to Boston that same night, again flying first class.

II. The Conflict Law

As the superintendent of the Boston Public Schools, you are a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 3(b) of G.L. c. 268 A prohibits a municipal employee, otherwise than as provided by law for the discharge of his official duties, from requesting or accepting for himself anything of substantial value for or because of official acts performed or to be performed.

Your acceptance of HBJ paying for your trip expenses as described above raises concerns under ' 3(b). As a matter of longstanding precedent, the Commission has made clear that public employees violate ' 3 when they travel at the invitation and payment of prospective vendors. Public Enforcement Letters 89-5 through 89-8; EC-COI-88-18; EC-COI-88-5; EC-COI-82-99. The Commission views these payments to be items of substantial value given to the public official for or because of official acts already performed, to be performed while on the trip, and/or to be performed in the future. Further, ' 3 will be deemed violated even if, as in your case, these expense payments are all limited to necessary and ordinary business expenses incurred by the public official in the course of his official duties. Thus, there need not be any excessive "winning and dining" or other "frills" for ' 3 to be violated regarding such payments.⁴

There are good public policy reasons for prohibiting the direct payment of even routine travel expenses by vendors. As the Commission stated in EC-COI-82-99 (dealing with members of a state board of registration traveling to view types of equipment proposed by a manufacturer for approval by the board where travel expenses were to be paid by the manufacturer):

A system wherein the manufacturers of products pay for trips by state employees is clearly open to abuse by the state employees as well as the manufacturers. State employees could exploit this system in order to procure unwarranted privileges. And the public impression that state employees were improperly influenced in their decisions could arise. Manufacturers, on the other hand, may view the quality of the accommodations and accoutrements on these trips as more important than the quality of their product.

In your defense, you make the following arguments. First, you note that the HBJ contract explicitly provides that HBJ will produce the customized reading materials at no cost to BPS. (Contracts to acquire educational materials are authorized by law. G.L. c.

40, sec.4.) Thus, when it became clear that it would be necessary for BPS and HBJ staff to meet in or about March of 1988, there was no question but that HBJ would pay for all necessary and reasonable costs related to such a meeting. Where there were many more HBJ staff who would have to attend the meeting than BPS staff to go to Florida. Regardless of whether it was BPS or HBJ staff traveling for such a meeting, you argue that the contract was clear that HBJ would cover the costs. Consequently, you assert that inasmuch as the contract provided for these trips at HBJ's expense, and contracts to acquire educational materials are authorized by law, you accepting these trips from HBJ was "provided by law for the discharge of official duties," and, therefore, exempted under ' 3.

While your position is not unreasonable, the Commission has already in effect held that the parties are not free to override the prohibitions of ' 3 through contract language. Thus, in EC-COI-88-5 the Commission determined that even if the request for proposals (RFP) issued by a public agency explicitly provided that the bidding vendor would be required to pay for the costs of state employee travel to the vendor's site, that RFP language (and by inference, the subsequent contract language) would not qualify for the "provided by law for the proper discharge of official duty" exemption in ' 3. Instead, the Commission insisted there must be either a state statute or regulation authorizing state employees to accept travel expenses from an interested vendor for the expenses to qualify for the ' 3 exemption.

In your situation, the Commission is aware of no statute or regulation which provides that you may accept travel expenses from an interested vendor. Consequently, the ' 3 exemption does not apply.⁵ Furthermore, the Commission questions whether it is as clear as you argue that the contract provided for HBJ to pay these expenses. We note that at the time of your first trip to Orlando in March of 1988, the understanding was not yet finalized. In addition, even in the executed contract, there is no explicit reference to HBJ paying for the costs of such trips. Exemptions to the conflict of interest law are to be construed narrowly. At a minimum, even if contract language could qualify for the ' 3 exemption which based on EC-COI-88-5 it cannot—the language would have to provide explicitly for such travel expenses.

You also argue that your contract with BPS, which is also authorized by statute, G.L. c. 71, ' 59, would have obligated BPS, not you, to pay the expenses of your trip to HBJ headquarters. Therefore, you received no personal benefit from HBJ. This argument is also not unreasonable, and your contract may distinguish your case from the precedents discussed above. The distinction is insufficient, however, to alter the Commission's position that under ' 3 the value of the travel accrues to the individual rather than the municipality, even if in fact the individual, as in your case, does not appear to have received any material benefit from having the expenses paid by the private vendor. See Public enforcement letter 89-8. The Commission acknowledges that there may be legitimate public purposes to justify a public employee's travel, and that the public interest may be furthered by allowing private business entities to pay for a public employee's travel expenses. The Commission's policy is designed to ensure that public employees' integrity is not compromised in the name of conserving public

funds. Thus, while the conflict law prohibits direct payment of travel expenses by vendors, trips such as yours may be lawfully accomplished without risk of violating the conflict of interest law in the following ways.

First, cities and towns may adopt an ordinance, by-law, or charter provision regulating vendor payments for travel expenses. Such an enactment could ensure that the travel expenses are legitimate and directly related to the public purposes served by the travel. For example, a municipality could require that the vendor identify the purpose and cost of the proposed travel, and that the public employee secure the approval of the governing body before undertaking the trip. This would ensure that the expenses are legitimate, and minimize the risk that the public employee is being “wined and dined” at the public’s expense.⁶

Alternatively, G.L. c. 44, ' 53A and/or G.L. c. 71, ' 37A may provide statutory vehicles by which a private party may pay travel expenses for public officials. These sections of the municipal finance law would appear to allow a city or town to accept grants from a private corporation or individual and, in turn, the city or town may expend such funds for the specific purpose intended with the approval of the mayor or the board of selectman. Thus, if HBJ decided to pay the travel expenses of members of the school department to attend an inspection trip, HBJ could probably do so by providing the necessary expenses to the town with the acknowledgement that the donation of gift is to be used to pay for travel expenses. This procedure allows for scrutiny by the city treasurer or auditor as to the reasonableness of the expenses incurred by the public employees. This would substantially reduce the potential for abuses. The application of G.L. c. 44, ' 53A and/or G.L. c. 71, ' 37A to trips is ultimately a matter of municipal finance law. Municipal officials should review this statute with the city solicitor or town counsel before implementing a procedure for vendor payments of travel expenses.

Finally, a city or town presumably could reimburse an employee for trip expenses incurred for business travel. The city or town could then bill the vendor for the costs of the public employee’s travel expenses. This alternative should also be reviewed with the city solicitor or town counsel.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and you future compliance with, the conflict of interest law.⁷ By agreeing to publication of this letter, you have also helped other well-intentioned public employees to understand and comply with the law. This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: January 18, 1990

¹ Given the system of approval applicable to BPS contracts and the incorporation of ordinances and documents into those contracts, it defies easy description to state what the contract contains and when it was entered. Prior to being awarded the basal reader contract, HBJ had been providing textbooks to the BPS pursuant to a standard blanket contract which had a ceiling of \$200,000. Following the letter to BPS' General Counsel referenced in the text of this paragraph, the terms of the contract were more or less continuously negotiated by BPS General Counsel on the one hand and HBJ representatives on the other. A May 25th amendment increased the contract ceiling to \$1,750,000. On June 21, 1988 a letter was sent to Mayor Flynn over your signature which increased the amount to \$2,500,000 and contained an article explicitly stating that HBJ will "provide at no additional cost to BPS, the following customized materials: [remedial reading material, among others]." The contract, as defined above, was approved by Corporation Counsel.

² On your return trip, your staff members traveled coach, you traveled first class. You explained that you returned separately from your staff members, and although you tried to book coach, the only seating available was first class.

³ According to you, one part of the introduction of the HBJ remedial reading program was the development of a video tape for elementary staff and one for middle school staff. The president and vice president of HBJ wanted you to introduce the reading program as the first segment of those videotapes. You agreed. Originally, the taping was going to take place in Boston. HBJ, however has a model classroom as part of its Orlando headquarters complex. To tape you in Boston would have required the entire HBJ taping crew to fly to Boston with all of its equipment. A second option would have been to hire a complete filming crew in the Boston area. In your view, the third and most sensible option was for you to fly to Orlando and tape in HBJ's studio. This is the option on which you and HBJ settled.

⁴ The Commission will view the presence of any such "frills" as a highly exacerbating factor. See in the Matter of Carl D. Pitaro, 1986 SEC 271 (the Mayor of Brockton agreed to a disposition agreement in which he paid a \$1,000 fine for violating section 3 by having taken a trip to Florida to inspect a developer's hotel where all expenses were paid by the developer, that developer having a hotel proposal pending in Brockton. Significant to the Commission imposing a fine were the facts that the Mayor's spouse accompanied him on the trip, and most of her expenses were also paid by the developer. In addition, at least a significant portion of one day of the Florida visit was spent by the Mayor and his spouse on the developer's boat.)

⁵ You point to several School Committee policies (DD, DJA, DJ) which you submit required you to have HBJ, rather than BPS, pay for the cost of your travel. In effect, you also suggest that these policies satisfy the section 3 "otherwise as provided by law" exemption. On their face, however, these policies do not speak to the issue of vendor-

paid-for travel. Even if they did explicitly deal with the issue, it is not clear whether such a policy has the force of law for section3 purposes. See fn. 6, below.

⁶ Travel expenses paid by a vendor under such a ordinance, by-law or charter provision would be “otherwise as provided by law” under G.L. c. 268A, section3 and would not give rise to a violation. The Commission takes no position at this time as to whether a regulation or by-law adopted by a school committee could satisfy the “otherwise as provided for by law” language of G.L. c.268A, section3. If a municipality wanted to pursue that particular route, it should obtain an opinion from the Commission.

⁷ The commission could have directed the staff to commence adjudicatory proceedings which, in appropriate circumstances, can result in fines of up to \$2,000.00 for any violation. The Commission chose to resolve this matter with a public enforcement letter because (1) there appears to be a widespread misconception among public employees that such payments are permissible; (2) there were no “frills” involved in these trips; and (3) the commission knows of no evidence that you were aware that these payments could be held to be in violation of the law.